

STATE OF NEW YORK
DIVISION OF TAX APPEALS

In the Matter of the Petitions :
of :
MARION SAKOW : ORDER
 : DTA NO. 850084
for Redetermination of a Deficiency or for Refund of :
New York State Personal Income Tax under Article 22 :
of the Tax Law for the Year 2015. :

Petitioner, Marion Sakow, filed two petitions for redetermination of a deficiency or for refund of New York State personal income tax under article 22 of the Tax Law for the year 2015.¹

Petitioner, appearing by the Law Offices of Carol M. Luttati (Carol M. Luttati, Esq., of counsel), filed a motion, dated February 10, 2023, seeking an order, pursuant to 20 NYCRR 3000.6 (a) (4), precluding the Division of Taxation from presenting evidence at the hearing with respect to all items for which defective and insufficient particulars were provided. In opposition to the motion, the Division of Taxation, appearing by Amanda Hiller, Esq. (Jennifer Hink-Brennan, Esq., of counsel), filed the affidavit of Jennifer Hink-Brennan, Esq., dated March 10, 2023. The 90-day period for issuance of this order commenced on March 13, 2023.

Based upon the pleadings, motion papers and other documents filed by the parties, Winifred M. Maloney, Administrative Law Judge, renders the following order.

¹ On March 14, 2022, petitioner simultaneously filed two petitions related to the year 2015. The two petitions were consolidated by the Division of Tax Appeals under DTA No. 850084.

ISSUE

Whether petitioner's motion seeking an order of preclusion should be granted.

FINDINGS OF FACT

1. On or about August 13, 2016, Walter I. and petitioner Marion Sakow filed a New York State resident income tax return, form IT-201, for the year 2015 (the Sakows' joint tax return for the year 2015).
2. Walter I. Sakow passed away on September 13, 2017.
3. Based upon a field audit conducted of the Sakows' tax return for the year 2015, the Division of Taxation (Division) issued to Marion Sakow and Walter I. Sakow a notice of deficiency, notice number L-049489137, dated February 19, 2019 (notice of deficiency), asserting tax due in the amount of \$305,061.00, plus interest and penalties.
4. In protest of the notice of deficiency, a request for conciliation conference was filed with the Bureau of Conciliation and Mediation Services (BCMS). After a conciliation conference, held on March 12, 2020, BCMS issued a conciliation order (CMS No. 000309733), dated December 17, 2021, denying petitioner's request and sustaining the notice of deficiency (conciliation order #1).
5. Petitioner, Marion Sakow, filed a form IT-285, request for innocent spouse relief (and separation of liability and equitable relief), for the year 2015 (form IT-285) with BCMS. Subsequently, BCMS forwarded petitioner's form IT-285 to the Division's Civil Enforcement Division (CED) for review of same.
6. On June 3, 2021, the Division's "CED-Innocent Spouse" unit issued to petitioner a relief from joint liability determination for the year 2015, which denied her request for innocent

spouse relief, separation of liability or equitable relief (separation of liability relief denial notice) for the following reasons:

“1. Based on the explanation given, you do not qualify for separation of liability relief.

2. You did not show in the statement and supporting documentation attached to your request for relief that paying the liability in full would result in economic hardship. . . .

3. You did not show in the statement and supporting documentation attached to your request for relief that you did not know, or have reason to know, at the time you signed the joint personal income tax return, of the item(s) giving rise to the deficiency or that the liability reported on the return would not be paid.

4. You received significant benefit from the unpaid tax during the 2015 tax year.”

7. Petitioner protested the separation of liability relief denial notice at BCMS. After a teleconference held on June 22, 2021, BCMS issued conciliation order (CMS No. 000328823), dated December 17, 2021, denying petitioner’s request for separation of liability relief, and sustaining the separation of liability relief denial notice (conciliation order #2).

8. On March 14, 2022, petitioner simultaneously filed two petitions with the Division of Tax Appeals. The first petition protests the notice of deficiency and conciliation order #1 (the specific merits petition), and the second petition protests the separation of liability relief denial notice and conciliation order #2 (the separation of liability relief petition). The Division of Tax Appeals consolidated the two petitions into the instant matter under DTA number 850084.

9. Included as an attachment to the specific merits petition was a 7-page “Section VIII: Reasons(s) [sic] for Dispute” that contained allegations of fact and error in separately numbered paragraphs under the following headings:

Section VIII “A” contained 15 numbered paragraphs related to the Division’s disallowance of petitioner’s schedule E loss on her 202 East 29th Street property

(29th Street property) because no rental income was reported from the 29th Street property;

Section VIII “B” contained 31 numbered paragraphs related to the Division’s inclusion in the Sakows’ income for the year 2015 of an alleged “flow thru capital gain” from the sale of 264 - 266 West 25th Street, New York, New York (25th Street property) by Mawash LLC, an entity in which the Division alleges petitioner’s now deceased husband was a 25% member;

Section VIII “C” contained 2 numbered paragraphs related to the negligence penalty asserted under Tax Law §§ 685 (b) (1) and (b) (2);

Section VIII “D” contained 2 numbered paragraphs related to the substantial understatement of liability penalty asserted under Tax Law § 685 (p); and

Section VIII “E” contained 10 paragraphs related to the denial of petitioner’s claim for separation of liability relief ² under Tax Law § 654.

10. Included as an attachment to the separation of liability relief petition are 41 numbered paragraphs in which petitioner made allegations of fact and error summarized as follows:

(i) Subsequent to the issuance of the notice of deficiency, petitioner filed a request for conciliation conference in which she raised, among other items, her request for relief from joint and several liability under Tax Law § 654 and “reserved the right to supplement her *pro forma* Protest” by submitting to the assigned conciliation conferee a memorandum of law with accompanying supporting documents and exhibits.

(ii) Thereafter, petitioner submitted her form IT-285 in which she elected separation of liability relief under Tax Law § 654 and Internal Revenue Code (IRC) (26 USC) § 6015 (c) with respect to any understatement of tax on the Sakows’ joint tax return for the year 2015 that was allocable to her deceased husband.

² In paragraph E10, petitioner incorporated by reference the sum and substance of the averments made in her separation of liability relief petition.

(iii) As part of her form IT-285, petitioner allocated the Division's proposed schedule E loss of \$283,061.00 to herself and its proposed unreported gain of \$3,114,353.00 from the sale of the 25th Street property to her deceased husband.

(iv) BCMS forwarded petitioner's form IT-285 to CED for issuance of a determination. On June 3, 2021, the "CED-Innocent Spouse" unit issued a separation of liability relief denial notice.

(v) Petitioner protested the separation of liability relief denial notice at BCMS, which issued conciliation order (CMS No. 000328823), dated December 17, 2021, denying her request and sustaining the separation of liability relief denial notice.

(vi) Petitioner is entitled to separation of liability relief because she filed a joint return for the year 2015 and "meets both of the applicable requirements (either one of which alone is sufficient to qualify for relief) at the time" she filed her form IT-285. Specifically, petitioner was no longer married to Mr. Sakow because he died on September 13, 2017; and petitioner was not a member of the same household as her deceased husband, with whom she had filed a 2015 joint tax return, at any time during the 12-month period ending on the date that she filed the form IT-285.

(vii) The Division erroneously denied petitioner's request for separation of liability relief on the grounds that:

(a) she did not show that paying the liability in full would result in economic hardship because economic hardship is not a factor in deciding whether to grant or deny relief under separation of liability;

(b) she did not show when she signed the joint tax return, she did not know, and had no reason to know, that there was an understatement of tax for the year 2015 because “knowledge” is not a factor in deciding whether to grant or deny relief under separation of liability; and

(c) petitioner received significant benefit from the unpaid tax during the year 2015 because “significant benefit” is not a factor in deciding whether to grant or deny relief under separation of liability.

(viii) During a BCMS teleconference, held in lieu of a BCMS conciliation conference, petitioner’s request for separation of liability relief was discussed, where the Division allegedly failed to set forth its continued reasons for denying petitioner’s request for separation of liability relief.

11. On June 1, 2022, the Division filed its answer to the consolidated petitions. The Division’s answer sets forth eight affirmative statements that may be summarized as follows:

(a) The Division conducted “an audit of Walter I. and Marion Sakow as to Tax Year 2015.”

(b) On February 19, 2019, the Division issued a notice of deficiency asserting that Mr. and Mrs. Sakow “owe tax of \$305,061.00 plus penalties and interest for Tax Year 2015, pursuant to Article 22 of the Tax Law.”

(c) In protest of the notice of deficiency, petitioner requested a conciliation conference with BCMS, which was held on March 12, 2020. By conciliation order (CMS No. 000309733), dated December 17, 2021, the conferee sustained the notice of deficiency.

(d) The Division issued a “Relief from Joint Liability Determination, dated June 3, 2021, denying Petitioner’s request for Innocent Spouse Relief, Separation of Liability or Equitable Relief for Tax Year 2015, pursuant to Article 22 of the Tax Law.”

(e) Petitioner requested a BCMS conciliation conference as to the separation of relief denial notice, which was held on June 22, 2021. “By Conciliation Order dated December 17, 2021 (CMS No. 328823), the conferee denied the request for innocent spouse relief and sustained the statutory notice.”

(f) “The Notices were properly issued by the Division.”

(g) “[T]he Notices are presumed to be correct.”

(h) Petitioner has the burden of establishing, “by clear and convincing evidence, that the Notices were improper and/or erroneous.”

12. On June 18, 2022, petitioner filed a reply affirmatively stating that:

“the Division is in error on the issue of the burden of proof. In order to qualify for Separation of Liability Relief under NYS Tax Law §654 and IRC §6015(c), the Petitioner must have filed a joint return and meet only one of the following two requirements at the time she filed, on 2/27/2020, her Form IT-285, Request for Innocent Spouse Relief (and Separation of Liability and Equitable relief):

(a) Petitioner was no longer married to Walter Sakow, with whom she filed a joint 2015 return, because Walter Sakow died on 9/13/2017; or

(b) Petitioner was not a member of the same household as her deceased husband, Walter Sakow, with whom she filed a 2015 joint return, at any time during the 12-month period ending on 2/27/2020, the date that the Petitioner filed her Form IT-285.

Petitioner also must establish a basis for allocating erroneous items on the Form-285 [sic]. The burden of proof (i.e. the burden of production as well as the burden of persuasion), then shifts to the Division to establish facts to be proven by the Division that support a legally recognized ground defense upon which Petitioner may, notwithstanding her satisfying the requirements for Separation of Liability Relief, be denied such relief.”

13. On June 24, 2022, petitioner served the Division with a demand for a bill of particulars (Demand).

14. The Division filed a motion, dated July 20, 2022, to vacate the Demand on the grounds that it is evidentiary in nature, relates to matters of law, is unduly burdensome, and constitutes impermissible requests for discovery.

15. On August 19, 2022, petitioner filed the affirmation of Carol M. Luttati, her representative, opposing the Division's motion to vacate the Demand and requesting oral argument on the motion under 20 NYCRR 3000.5 (c).

16. By order dated November 17, 2022, the undersigned "directed [the Division] to supply a bill of particulars responding to paragraphs 1 through 4 of petitioner's demand for a bill of particulars within 30 days of the date of this order." By letter, dated December 14, 2022, the undersigned granted the Division until January 12, 2023, to file its responding bill of particulars.

17. On January 11, 2023, the Division, by certified mail, served its bill of particulars.

18. On February 10, 2023, petitioner timely filed the instant motion, which claims that the Division's responses to the Demand were defective and insufficient to amplify the pleadings. The particularization requests made by the petitioner and the Division's responses thereto are set forth below.

19. Paragraph 1 of the Demand requires the Division to:

"[s]tate with particularity, all facts to be proven by the Division (that bears the burden of proof) as to any and all defense(s) to the Petitioner's request for Separation of Liability Relief under NYS Tax Law §654 and IRC §6015(c)."

The Division responded to the Demand in relation to this paragraph as follows:

"As Ms. Sakow indicates on her IT-210 for Tax Year 2015, she is a real estate professional. There are various Separation of Liability requirements (thresholds) that must be met for a taxpayer to be considered for separation of liability relief from a joint and several liability. First, Ms. Sakow must have filed for relief within two years from first collection activity. She met this requirement by filing the IT-285 Request for Innocent Spouse Relief (and Separation of Liability and Equitable Relief) on February 27, 2020. The original date of the Notice was February 11, 2019. Second, Separation of liability only applies to amounts that

have not been paid. As to this particular assessment, no payments have been made. Third, the taxpayers must have filed a joint return with an understatement of tax. Ms. Sakow and her husband filed a joint return for Tax Year 2015 and they were assessed for an understatement of tax as provided in Notice No. L-049489137. Fourth, the taxpayer claiming relief must be no longer married to, or legally separated from (or widowed from) the spouse with whom the joint return was filed. Ms. Sakow is widowed. Fifth, the taxpayer claiming relief must not have been involved in a transfer of assets with her spouse as part of a fraudulent scheme. There is no indication that there was a joint fraudulent scheme. Sixth, the taxpayer claiming relief must not have been involved in a transfer of assets with her spouse in an attempt to avoid the payment of tax. There is no indication that there was an illegal attempt to avoid the payment of tax. Lastly, at the time the joint return was signed by the requestor, the taxpayer needed to have actual knowledge of any erroneous items giving rise to the understatement of tax.

Given the amount claimed as a loss (expenses) at 202 E. 29th Street, NYC, and the funds received from the sale of 264-266 West 25th St., NY, NY, it is difficult to see how Ms. Sakow can claim she did not know and that she did not receive a benefit. She is a business woman [sic] and has been a shareholder and responsible person for numerous NYS businesses. As even Ms. Luttati points out in her correspondence, 'Mrs. Sakow has for over 40 years been in the real estate trade or business. Indeed, her occupation, as stated on her 2015 Form 1040 return is Real Estate Professional.' Mrs. Shakow [sic] lived with and was married to Mr. Sakow during Tax Year 2015 as well as at the time of the filing of the return for Tax Year 2015.

Ms. Sakow's claim in her IT-285 that 'I'm 83 years old, was married for 53 years and had a traditional marriage in which my husband handled all of our finances and taxes,' just is not credible. Moreover, *if* she didn't review the returns before they were filed and just signed the return 'at her husband's request,' as she says in her IT-285, this would not be an adequate reason for innocent spouse relief because it was her *choice* not to review the returns. She does not indicate any abuse or financial control that prevented her access to financial information and separation of liability relief does not apply to any part of the understated tax due to her spouse's erroneous items for which she had actual knowledge.

Ms. Sakow had actual knowledge of the underreported item(s) giving rise to the assessment and should be denied innocent spouse (separation of liability) relief. As explained in Publication 971, page 7, '[y]our actual knowledge of the proper tax treatment of an erroneous item is not relevant for purposes of demonstrating that you had actual knowledge of that item. Neither is your actual knowledge of how the erroneous item was treated on the tax return.' It is not credible that Ms. Sakow did not have actual knowledge of the property or the sale of 25% of a property where she is the beneficiary of the trust that allegedly owns the property resulting in a \$3.1 million capital gain for both taxpayers that have

been married for 53 years. Without any indication of Ms. Sakow being denied financial control by the spouse and Ms. Sakow's history as a businesswoman herself, we believe actual knowledge is apparent. Again, the Division reserves the right to make additional assertions if subsequent information is presented."

20. Paragraph 2 of the Demand requires the Division to:

"[s]tate with particularity, all facts to be proven by the Division (that bears the burden of proof) showing that on 10/15/2016, when the Petitioner signed the 2015 joint return, she had 'actual knowledge' (defined as actual and clear awareness of the omitted income) of the receipt of unreported income allocable to her husband, Walter Sakow (since deceased) – namely, the check for \$3,114,353.10 from LCP 25th Street Management LLC payable to Walter Sakow with respect to the sale of 264-266 West 25th Street, New York, NY – giving rise to the understatement of tax/deficiency (or portion thereof)."

The Division responded to the Demand in relation to this paragraph as follows:

"The Division is not asserting the check is the "item" that gave Petitioner 'actual knowledge' [sic]. However, the Division reserves the right to make this assertion if new information is presented to support this.

For some clarification, the Division asserts that Ms. Sakow's actual knowledge is of the building – the 264-266 West 25th St., NY, NY property – that was sold and resulted in the gain at issue. In particular, Petitioner provided a verified bill of particulars from a court case where she, Marion Sakow, is named as one of the defendants. That case discussed the 25th Street property extensively and was provided by Petitioner as part of the conciliation conference for the Audit assessment. The Division asserts that Petitioner had actual knowledge of the building going back to at least 1976.

Again, provided by Petitioner, the Division also says that there is a court order for the Supreme Court matter – State of New York Index No. 15752/08, Sakow v. Waldman, et. al. discussing the Mawash Realty Trust, the trust created by Mr. Sakow, for the benefit of Jason Sakow (the son) and Marion Schainberg (aka Sakow – her maiden name). Ms. Sakow was a beneficiary of the trust that held the shares of the 25th Street property and the trust should have provided details of all transactions occurring with the trust including the sale of the 25th Street property. Ms. Sakow would have actual knowledge of the transfer of the shares from the 25th Street property and its subsequent sale. The Division asserts that the two combined are enough to show actual knowledge of the item (the 25th Street property). Pursuant to Cheshire v. Commissioner of Internal Revenue, 282 F.3d 326 (5th Cir. 2002), actual knowledge is clarified as to having knowledge of an item and the item then gives rise to a deficiency."

21. Paragraph 3 of the Demand requires the Division to “[s]tate with particularity, all facts to be proven by the Division (that bears the burden of proof) showing that the Petitioner and Walter Sakow transferred assets as part of a fraudulent scheme.” The Division responded in relation to this paragraph as follows:

“[t]he Division never asserted anything was transferred as part of a fraudulent scheme. The Division saw some very crafty, but likely legal accounting and legal practices, but was not able to see enough to label them fraudulent based on what was presented. However, the Division reserves the right to make this assertion if new information is presented to support.”

22. Paragraph 4 of the Demand requires the Division to:

“[s]tate with particularity, all facts to be proven by the Division (that bears the burden of proof) showing that Walter Sakow transferred property to the Petitioner to avoid tax or the payment of tax, or that the Petitioner transferred property to Walter Sakow to avoid tax or the payment of tax.”

The Division responded to the Demand in relation to this paragraph as follows:

“[t]he Division never asserted that Petitioner or Mr. Sakow transferred property to Petitioner or vice versa, to avoid tax. The Division saw some very crafty, but likely legal accounting and legal practices, but was not able to see enough to label them as illegal tax avoidance actions based on what was presented. However, the Division reserves the right to make this assertion if new information is presented to support this.”

CONCLUSIONS OF LAW

A. The Tax Appeals Tribunal Rules of Practice and Procedure (Rules) permit the use of a bill of particulars in proceedings in the Division of Tax Appeals. Specifically, section 3000.6

(a) of the Rules provides as follows:

“(1) After all pleadings have been served, a party may wish the adverse party to supply further details of the allegations in a pleading to prevent surprise at the hearing and to limit the scope of the proof. For this purpose, a party may serve written notice on the adverse party demanding a bill of particulars within 30 days from the date on which the last pleading was served.

(2) The written demand for a bill of particulars must state the items concerning which such particulars are desired. If the party upon whom such demand is served is unwilling

to give such particulars, he or she may, in writing to the supervising administrative law judge, make a motion to the tribunal to vacate or modify such demand within 20 days after receipt thereof. The motion to vacate or modify should be supported by papers which specify clearly the objections and the grounds for objection. If no such motion is made, the bill of particulars demanded shall be served within 30 days after the demand, unless the administrative law judge designated by the tribunal shall direct otherwise.

(3) In the event a party fails to furnish a bill of particulars, the administrative law judge designated by the tribunal may, upon motion, issue an order precluding the party from giving evidence at the hearing of items of which particulars have not been delivered. A motion for such relief shall be made within 30 days of the expiration of the date specified for compliance with the request.

(4) Where a bill of particulars is regarded as defective by the party upon whom it is served, the administrative law judge designated by the tribunal may, upon notice, make an order of preclusion or direct the service of a further bill. In the absence of special circumstances, a motion for such relief shall be made within 30 days after the receipt of the bill claimed to be insufficient.

(5) A preclusion order may provide that it will be effective unless a proper bill is served within a specified time.”

B. As noted above, the Rules permit the use of a bill of particulars in proceedings in the Division of Tax Appeals “to prevent surprise at the hearing and to limit the scope of the proof” (20 NYCRR 3000.6 [a] [1]). An administrative law judge is guided but not bound by the provisions of the New York Civil Practice Law and Rules (CPLR) (*see* 20 NYCRR 3000.5 [a]). Since a wealth of case law has been created under CPLR 3041, “Bill of Particulars in Any Case,” it is helpful to refer to that section for guidance in matters before the Division of Tax Appeals.

C. The function of the bill of particulars is to enable the party demanding the particulars to know definitely the claims or defenses that he or she is called upon to meet (*see Johnson, Drake and Piper v State of New York*, 43 Misc 2d 513, 515 [Ct of Claims 1964]). A demand for a bill of particulars may be used to amplify the pleadings, prevent surprise and limit issues, but may not be used to gain disclosure of evidentiary detail that adverse parties will rely upon to prove their claim (*Bassett v Bondo Sangsa Co., Ltd.*, 94 AD2d 358, 359 [1st Dept 1983], *appeal*

dismissed 60 NY2d 962 [1983]; *State of New York v Horsemen's Benevolent and Protective Assn.*, 34 AD2d 769, 770 [1st Dept 1970]). However, a demand for a bill of particulars may not be used to probe into an adversary's legal interpretation or to obtain disclosure of evidence. While drawing a line between a demand for a bill of particulars that seeks evidence versus one that seeks only to crystalize the issues is an inherently difficult task (*see* Practice Commentary CPLR 3041, C3041:2 [Bills of Particulars, Defined]), it is especially important to make that distinction in this forum, where an administrative law judge may not entertain a motion for discovery (*see* 20 NYCRR 3000.5 [a]). Generally, a party need particularize only those matters upon which it has the burden of proof (*Holland v St Paul Fire & Marine Ins. Co.*, 101 AD2d 625 [3d Dept 1984]).

D. In proceedings in the Division of Tax Appeals, a presumption of correctness attaches to a notice of deficiency and the petitioner bears the burden of overcoming that presumption (*see Matter of Estate of Gucci*, Tax Appeals Tribunal, July 10, 1997, citing *Matter of Atlantic & Hudson*, Tax Appeals Tribunal, January 30, 1992). This assignment of the burden of proof notwithstanding, the Rules provide that the Division's answer "shall fully and completely advise the petitioner and the division of tax appeals of the defense" (20 NYCRR 3000.4 [b] [2]). It is in this context that the Division may be required to respond to a demand for a bill of particulars to amplify its answer, as it was ordered to provide previously in this matter.

E. The remedy for failure to serve a bill of particulars or for service of an inadequate bill of particulars is an order precluding the party from giving evidence at the hearing of items of which particulars have not been delivered (*see* 20 NYCRR 3000.6 [a] [3]), or a conditional order of preclusion that becomes effective unless a proper bill is served within a specified time frame (*see* 20 NYCRR 3000.6 [a] [5]).

F. In the instant motion, petitioner seeks an order precluding the Division from giving evidence at the hearing as to the following:

- “(i) That the Petitioner and Walter Sakow transferred assets as part of a fraudulent scheme;
- (ii) That Walter Sakow transferred property to the Petitioner to avoid tax or the payment of tax, or that the Petitioner transferred property to Walter Sakow to avoid tax or the payment of tax;
- (iii) That when the Petitioner signed the 2015 joint return she had actual knowledge of the receipt of unreported income of \$3,114,353.10 allocable to her late husband, Walter Sakow, from the sale of the 25th Street Property by Mawash LLC giving rise to the understatement of tax/deficiency (or portion thereof);
- (iv) That the Petitioner derived a benefit; and
- (v) That the Division has any other unidentified affirmative defense to the Petitioner’s request for Separation of Liability Relief.”

G. The Division asserts that its bill of particulars “clearly amplified its contention above what the Answer contained.” With respect to petitioner’s assertion that the Division did not provide more than what had been given it by the Division prior to the issuance of the assessment, the Division contends that it “has been consistent in what it is asserting, so there are no surprises.” The Division further contends that the bulk of petitioner’s arguments in its motion to preclude are essentially arguments on the merits. Because the bill of particulars amplified in detail the basis of its claims, the Division contends that the bill of particulars was sufficient, and petitioner is not entitled to an order of preclusion as to the five demands in her “Prayer for Relief.”

H. A review of the Division’s response to paragraph 1 of the Demand indicates that it is not challenging the threshold requirements for entitlement to separation of liability under Tax Law § 654 (*see* IRC [26 USC] § 6015 [c] [3] [A-C]; Treas Reg [26 CFR] § 1.6015-3 [c] [2]), including that petitioner was not involved in a transfer of assets with Mr. Sakow as part of a

fraudulent scheme, and that petitioner was not involved in a transfer in an attempt to avoid tax or the payment of tax. However, in its response to paragraph 3 of the Demand, the Division denied having information sufficient to allege that petitioner and Mr. Sakow transferred assets as part of a fraudulent scheme but reserved the right to make such a claim if new information is presented. In a similar vein, in response to paragraph 4 of the Demand, the Division denied ever asserting that petitioner transferred or received property to avoid tax but reserved the right to make such an assertion. Given the Division's admission in its response to paragraph 1 of the Demand that there was no transfer of assets as part of a fraudulent scheme and no transfer of property to avoid tax or the payment of tax, I find the Division's responses to paragraphs 3 and 4 of the Demand to be defective and insufficient in that they do not provide any particulars whatsoever, only admissions against interest. As such, the Division is directed to provide a supplemental bill of particulars in relation to any fraudulent scheme by petitioner to transfer assets (paragraph 3 of the Demand), and in relation to a transfer of assets between petitioner and Mr. Sakow to avoid tax or payment of tax (paragraph 4 of the Demand). If the Division fails to supplement its bill of particulars with respect to paragraphs 3 and 4 of the Demand, it will be precluded from offering evidence at the hearing in this matter regarding any fraudulent scheme by petitioner to transfer assets, and a transfer of assets between petitioner and Mr. Sakow to avoid tax or payment of tax (*see* 20 NYCRR 3000.6 [a] [5]).

I. As part of its response to paragraph 1 of the Demand, the Division indicated that it intends to demonstrate petitioner's actual knowledge of the items of deduction and income that gave rise to the deficiency. Similarly, as to its response to paragraph 2 of the Demand, the Division clarified that it is seeking to demonstrate petitioner's actual knowledge of the sale of the 25th Street property. I find that the Division's responses to paragraphs 1 and 2 of the Demand

are sufficient to apprise petitioner as to what issues the Division intends to raise at the hearing or as an affirmative defense. As discussed above, the purpose of a bill of particulars is to amplify the pleadings to prevent surprise and narrow the issues at the hearing. The parties will have the opportunity at the hearing to present their respective positions regarding the issue of petitioner's actual knowledge of the receipt of the unreported item of income.

J. In accordance with conclusion of law H, the Division will be precluded from offering evidence at the hearing in this matter in relation to any fraudulent scheme by petitioner to transfer assets (paragraph 3 of the Demand), and in relation to a transfer of assets between petitioner and Mr. Sakow to avoid tax or payment of tax (paragraph 4 of the Demand), unless it provides a supplemental bill of particulars regarding those paragraphs within 30 days of the issuance of this order but, otherwise, petitioner's motion for an order of preclusion is denied.

DATED: Albany, New York
June 8, 2023

/s/ Winifred M. Maloney
ADMINISTRATIVE LAW JUDGE